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# Perfect Kam Hung Sdn Bhd v Cheah Tai Hoe & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D22–1195 OF 2009
MOHAMAD ARIFF J
25 MAY 2011

*Sale of Goods — Merchantable quality — Fitness for purpose — Plaintiff contracted to buy tipper lorry from defendants — Lorry not roadworthy but defective and unfit for intended purpose — Whether defendants' failure to remedy lorry's defects after test-drive amounted to repudiation of contract — Whether time for delivery of vehicle essential term of contract*

The plaintiff claimed that a tipper lorry it had contracted to buy from the defendants had several defects, was unroadworthy, not fit for the purpose intended and was not delivered within the agreed time. The plaintiff sued for breach and/or repudiation of the contract and claimed for refund of the deposit/part payment of RM24,160 it had paid under the agreement, RM53,025 as hiring costs for a replacement lorry, RM464 for repair costs and interest at 8%pa on the amount awarded by the court from date of filing of the action till date of settlement. The defendants counterclaimed for specific performance of the agreement and RM3,620 as costs for additional works done on the tipper lorry. The plaintiff said the tipper lorry was delivered to it four months later than as was contracted, that it did not conform to the 'sample' provided by the defendants before the contract was entered into and that it was wholly unfit for the purpose made known to the defendants, viz for construction work in a water pipeline project. Because of the unfitness of the vehicle, the plaintiff said it had to hire a replacement lorry to fulfill its contracts. The plaintiff said the tipper lorry gave problems immediately after it was taken on a test drive. A check at a workshop revealed the lorry's engine had never been overhauled, contrary to what was agreed, there was leakage of fuel and oil from various parts, the gear box and brake systems were not functioning and the lorry's wheelbase was not extended, contrary to what was agreed. Two days after test driving the lorry, the plaintiff returned it to the defendants with a request to overhaul the engine, extend the wheelbase and attend to the necessary repairs and maintenance within seven days but this was not done. The defendants denied the sale was by sample and that the lorry the plaintiff had bought was the one he had actually seen. They said the necessary repairs were done and the lorry was roadworthy.

**Held**, allowing the plaintiff's claim and dismissing the defendants' counterclaim with costs to be taxed:

(1) By failing to do the necessary overhaul, maintenance and repairs, the

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defendants had repudiated the contract, for which the plaintiff was entitled to claim for damages (see para 16).

(2) The facts established that the tipper lorry was not safe, roadworthy or fit for the purpose intended. It was more probable than not that the plaintiff had made known the purpose for which the vehicle was intended, and as such relied on the defendants' skill and judgment as they dealt with goods of that description (see paras 17 & 19).

(3) The evidence did not show a continued insistence by the plaintiff that delivery of the lorry was to be made within one month from the payment of the deposit. It showed the plaintiff agreed to take delivery even four months later. As such time was no longer an essential condition between the parties (see para 20).

(4) The claim for the additional damages was not proven. The evidence of the plaintiff's supervisor (PW3) was unsatisfactory as to proof. He could not conclusively state what was the exact amount incurred. The documents produced at trial also did not establish the actual loss claimed (see para 22).

[Editorial Notes: The plaintiff was also ordered to take immediate steps to ensure the registration card for the tipper lorry which was in the possession of the finance company, Orix Leasing, be returned to the defendants.]

**[Bahasa Malaysia summary**

Plaintif mendakwa bahawa lori 'tipper' yang dikontrakkan untuk dibeli daripada defendan-defendan mengalami beberapa kecacatan, tidak boleh digunakan di jalan raya, tidak sesuai untuk kegunaannya dan tidak dihantar dalam jangka masa yang dipersetujui plaintif mendakwa bagi pelanggaran dan/atau penolakan kontrak dan menuntut pemulangan deposit/sebahagian bayaran RM24,160 yang dibayar olehnya di bawah perjanjian tersebut, RM53,025 sebagai kos sewa untuk lori gantian, RM464 untuk kos pembaikian dan faedah pada kadar 8% setahun ke atas jumlah yang diawardkan oleh mahkamah daripada tarikh pemfailan tindakan sehingga tarikh penyelesaian. Defendan-defendan membuat tuntutan balas bagi perlaksanaan spesifik perjanjian tersebut dan RM3,620 sebagai kos untuk kerja-kerja tambahan yang dilakukan pada lori 'tipper' tersebut. Plaintif menyatakan bahawa lori 'tipper' tersebut dihantar empat bulan daripada apa yang telah dikontrakkan kepadanya, bahawa ia tidak menepati 'contoh' yang disediakan oleh defendan-defendan sebelum kontrak tersebut dimeterai dan bahawa ia tidak sesuai bagi kegunaan seperti yang diberitahu kepada defendan-defendan, iaitu bagi kerja pembinaan bagi projek saluran paip air. Disebabkan kenderaan tersebut tidak sesuai digunakan, plaintif terpaksa menyewa lori gantian bagi memenuhi kontraknya. Plaintif menyatakan bahawa lori 'tipper' tersebut bermasalah sebaik sahaja lori tersebut dipandu uji. Pemeriksaan di bengkel menunjukkan bahawa enjin lori tersebut tidak pernah

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dibaikpulih bercanggah dengan apa yang telah dipersetujui, terdapat kebocoran bahan api dan minyak daripada beberapa bahagian, kotak gear dan system brek tidak berfungsi dan jarak di antara bahagian depan kenderaan dengan gandar roda belakang tidak ditambah, bercanggah dengan apa yang telah dipersetujui. Dua hari selepas pandu uji lori tersebut, plaintif memulangkannya kepada defendan-defendan dengan permintaan agar enjin dibaikpulih, jarak di antara bahagian depan kenderaan dengan gandar roda belakang ditambah dan kerja-kerja pembaikian yang diperlukan dan penyelenggaraan dilakukan dalam masa tujuh hari tetapi ini tidak dijalankan. Defendan-defendan menafikan bahawa jualan tersebut berdasarkan contoh dan bahawa lori yang dibeli oleh plaintif adalah sepertimana yang telah dilihat oleh beliau. Mereka menyatakan bahawa pembaikian yang diperlukan telah dilakukan dan lori tersebut boleh digunakan di jalan raya.

**Diputuskan**, membenarkan tuntutan plaintif dengan kos dan menolak tuntutan balas defendan-defendan dengan kos untuk ditaksir:

(1) Kegagalan untuk melakukan pemeriksaan, penyelenggaraan dan pembaikian yang diperlukan, defendan-defendan telah menolak kontrak tersebut, yang mana plaintif berhak untuk menuntut ganti rugi (lihat perenggan 16).

(2) Fakta-fakta membuktikan bahawa lori 'tipper' adalah tidak selamat, tidak boleh digunakan di jalan raya atau tidak sesuai untuk kegunaannya. Terdapat kebarangkalian bahawa plaintif telah memberitahu tujuan bagi kegunaan kenderaan tersebut dan oleh itu, bergantung kepada kemahiran dan pengamatan defendan-defendan memandangkan mereka menguruskan barang perdagangan sedemikian (lihat perenggan 17 & 19).

(3) Keterangan tidak menunjukkan bahawa terdapat desakan yang berterusan daripada plaintif bahawa penghantaran lori perlu dibuat dalam jangka masa sebulan daripada bayaran deposit. Ini menunjukkan plaintif telah bersetuju untuk menerima penghantaran meskipun pada empat bulan kemudian. Oleh itu masa bukan lagi merupakan syarat utama di antara pihak-pihak (lihat perenggan 20).

(4) Tuntutan untuk ganti rugi tambahan tidak disahkan. Keterangan penyelia plaintif (PW3) tidak memuaskan untuk dijadikan bukti. Dia tidak dapat menyatakan jumlah tepat yang ditanggung. Dokumen-dokumen yang dikemukakan pada perbicaraan juga tidak menunjukkan kerugian sebenar sepertimana yang dituntut (lihat perenggan 22).

[Nota Editorial: Plaintif juga diarahkan untuk mengambil langkah segera bagi memastikan kad pendaftaran untuk lori 'tipper' yang berada dalam milikan syarikat kewangan, Orix Leasing, dipulangkan kepada defendan-defendan.]]

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**Notes**

For a case on fitness for purpose, see 11 *Mallal's Digest* (4th Ed, 2011 Reissue) para 794.

**Cases referred to**

*Lutton v Saville Tractors (Belfast) Ltd* [1986] NI 327 (refd)

*Union Alloy (M) Sdn Bhd v Sykt Pembenaan Yeoh Tiong Lay Sdn Bhd* [1993] 3 MLJ 167, HC (refd)

**Legislation referred to**

Sale of Goods Act 1957 ss 12(2), 16(1)(a), (b), 17, 41, 42

*Brian Ernest Cumming (Cherrien Chan Siew Chin with him) (Gideon Tan Razali Zaini) for the plaintiff.*

*Philip Chai (Philip Chai & Co) for the defendants.*

**Mohamad Ariff J:**

**[1]** This is a case after a full trial where the subject matter is a tipper lorry. The plaintiff, as the purchaser, sues the defendants for breach of contract and/or a repudiation of the contract. The plaintiff claims the defendants failed to deliver the tipper lorry in a roadworthy and good working order and condition, and additionally failed to deliver within the stipulated time agreed between the parties. The defendants on the other hand counterclaim against the plaintiff for specific performance of the agreement and the sum of RM3,620 being the cost of additional works done on the tipper lorry.

**[2]** The plaintiff claims that judgment be entered against the defendants for the following: (a) refund of the deposit and/or part payment of RM24,160 paid by the plaintiff to the defendants; (b) a sum of RM53,025 being the cost for hiring a replacement lorry for the period 9 October 2004 to 31 January 2005; (c) repair costs of RM464; (d) interest at 8%pa on the sum awarded by the court from the date of filing of the action until date of full and final settlement.

**[3]** Three witnesses were called for the plaintiff, as against two for the defendants.

**[4]** The plaintiff cites provisions in the Sale of Goods Act, namely:

(a) s 17 in relation to sale by sample;

(b) s 16(1)(a) and (b) in relation to implied condition as to quality of fitness;

(c) s 12(2) in relation to breach of a condition which is an essential stipulation and the main purpose of the contract; and

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(d) ss 41 and 42 in relation to the right to examine and reject the goods.

**[5]** In summary the plaintiff's case can be stated thus: he purchased the lorry by looking at the sample provided by the defendants; the lorry that was delivered did not conform to the sample and therefore was in breach of the impled condition that the lorry supplied should correspond to the sample in quality, and the lorry should be free from any defect rendering it unmerchantable which would not be apparent on reasonable examination of the sample; the lorry was thus delivered not in a roadworthy and good working order and condition; it was delivered four months later than contracted; and was wholly unfit for the purpose known or disclosed to the defendants, namely that the plaintiff required the tipper lorry for his construction work in relation to a water pipeline project.

**[6]** The Plaintiff says the Defendants were informed of the necessary repairs that needed to be done to the tipper lorry to render it in a roadworthy and good working condition so as to be fit for the purpose for which the Plaintiff intended it, but the Defendants did not do the necessary repairs in full.

**[7]** The defendants, on the other hand, deny there was a sale by sample, and state categorically that what the plaintiff was shown was not a sample but the actual tipper lorry that he purchased. Further, all the necessary repairs were done and the lorry was in a roadworthy condition. The defendants also deny they were informed of the purpose for which the lorry was intended.

**[8]** The tipper lorry was also subject to a financing arrangement, but the evidence disclosed the defendants requested the finance company to terminate the hire purchase agreement and to regard the deposit paid as forfeited. It appears the registration card has remained in the possession of the finance company so that the defendants has not been able to sell off the tipper lorry to mitigate losses.

**[9]** The tipper lorry was returned to the defendants by the plaintiff. The plaintiff has not at any time acknowledged delivery by signing on the delivery order despite being requested to do so by the defendants.

**[10]** This is a case where the main facts are fiercely contested by the parties. The credibility and veracity of the evidence, both testimonial and documentary, and the inherent probabilities in relation to the evidence advanced by each side, are crucial.

**[11]** The defendants say the plaintiff changed his mind to purchase a tipper lorry for reasons of his own, although the tipper lorry was delivered as contracted after having undergone even a Puskom examination. The plaintiff

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says the defendants knew the purpose for which he intended the lorry, and failed to deliver the lorry in a fit and merchantable state so that he had to hire a replacement lorry and thereby incurred costs in order to fulfil the construction works which he contracted. Interestingly, the defendants did not even indicate what the reasons to attribute to the plaintiff were. Quite frankly, I find it inherently improbable to conclude that the defendant's version of the facts is true. Putting it simply, why would the plaintiff renege on the contract and then choose to hire another replacement lorry allegedly at a cost of RM53,003 when he could have chosen to proceed with the contract and take delivery of the tipper lorry for which he had already paid a sizeable deposit. The only plausible and logical reason has to be the tipper lorry contracted for was not fit for the purpose for which it was intended and did not have the necessary merchantable quality.

**[12]** The person in the best position to describe the condition of the tipper lorry when delivered would have been the driver (Ramachandran) who test drove the lorry to the plaintiff's premises. According to the plaintiff's version of the facts, it broke down in transit on 11 December 2004. The testimony of PW1, Tan Eng Nam, is particularly relevant in this regard.

**[13]** (See Q & A 25–30 of the notes of proceedings):

25

Q: What happened after the both of you arrived at the Defendants' premises?

A: We had a look at the lorry and asked the 2nd Defendant, Cheah Kong Seng if the lorry has air conditioning like the sample lorry which was shown to me.

26

Q: What was the 2nd Defendant's response to you?

A: The 2nd Defendant told me that the second hand lorry bought by me did not include air conditioning.

27

Q: What happened then?

A: I was unhappy with the condition of the tipper lorry and insisted that the lorry be test driven since we had not even started it up at the time. The 2nd Defendant kept requesting me to sign a document which he alleged is an acknowledgement of collection of the lorry in good condition. But I refused to sign the document and insisted that we want to test drive the tipper lorry to determine its condition.

28

Q: What happened after that?

A: He handed me the key and I asked Ramachandran to test drive the tipper lorry.

29

Q: What happened then?

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A: My driver called me 15-20 minutes later in an excited manner and told me that the lorry had no brakes at all and that the engine was rough and had no power and that he nearly hit someone. I immediately instructed him to send it to the workshop for repairs as it may cause an accident in such a condition.

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Q: What did he do next?

A: He sent the tipper lorry to a nearby workshop named KNH Auto Service for repairs. I went to the workshop to find out what happened on the following day.

**[14]** When PW 1 went to take delivery, he found that the tipper lorry did not have air conditioning, unlike the 'sample' lorry which had been shown to him. Tan was unhappy with the condition of the lorry and insisted on having it test driven. Further, he made it a point not to acknowledge delivery in good order and condition.

**[15]** Ramachandran, the driver, has since passed away, but the other evidence introduced tends to corroborate his reaction to the condition of the lorry. After all, the lorry was almost immediately sent to a nearby workshop KNH Auto Service for repairs. This is what PW 1 testified:

31

Q: Can you please tell the Court the result of the examination and repair?

A: I discovered that the engine of the tipper lorry was never been overhauled as agreed, there is leakage of fuel from the oil pump, oil leaked from its gear box and pump HYD PTO, the gear box and brake system were not functioning and needed repair and replacement. I also realised the tipper lorry's wheelbase was not extended as agreed.

32

Q: Mr. Tan, please refer to page 8 Part C of the Bundle of Documents. Can you please tell this Honourable Court what is this document?

A: This is the statement listing out the defects and damage on the tipper lorry issued by the workshop, KNH Auto Service upon examination and repair of the tipper lorry. I had requested the workshop to list out the defects and send them to the Plaintiff's office attention to me.

**[16]** Hence PW1 discovered the engine had not been overhauled, the fuel leaked from the oil pump, from the gear box and pump HYD PTO, the brake system was not functioning and the wheelbase had not been extended. The plaintiff thereafter returned the lorry to the defendants on 14 December 2004, namely two days after test driving it. The plaintiff's conduct is therefore consistent with the tipper lorry being described as defective and unfit for the

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intended purpose. PW1 requested the defendants to overhaul the engine, extend the wheelbase and perform the necessary maintenance and repairs within seven days. This was not done.

**[17]** I agree with the position taken by the plaintiff that by failing to do the necessary overhaul, maintenance and repairs, the defendants had thus repudiated the contract, for which the plaintiff would be entitled to claim for damages.

**[18]** The necessary elements to establish liability under s 16(1)(a) are therefore established on the evidence. I find it more probable than not that the plaintiff had made known the purpose for which he intended the tipper lorry, and as such relied on the defendants' skill and judgment. And the defendants' dealt with goods of that description. See *Union Alloy (M) Sdn Bhd v Sykt Pembenaan Yeoh Tiong Lay Sdn Bhd* [1993] 3 MLJ 167. The mere disclosure of the purpose can in these circumstances constitute sufficient evidence of reliance.

**[19]** The fact that the defendants admittedly showed a 'sample' lorry to the plaintiff fits and corroborates the plaintiff's version of the facts. Even in the case of a second hand vehicle, it has to be satisfactory although it need be as good as new goods obviously. The vehicle must at least be 'safe and roadworthy' and 'fit for the purpose as it was reasonable to expect'. See *Atiyah's Sale of Good* (12th Ed) at pp 186–187. See also *Lutton v Saville Tractors (Belfast) Ltd* [1986] NI 327: a second hand vehicle must still be reliable and capable of giving good service and fair performance.

**[20]** The facts here establish on a balance of probabilities the second hand tipper lorry was not safe and roadworthy and fit for the purpose intended.

**[21]** As for the other grounds, I do not find on the evidence a continued insistence by the plaintiff that delivery be made within one month from the date of payment of the deposit. The evidence disclose the plaintiff agreed to take delivery even four months later, and as such time has to be regarded as being at large between the parties and no longer an essential condition.

**[22]** As for the argument in relation to sale by 'sample', I do not believe it can apply here since generally for it to apply there has to be a 'bulk' sale for which a sample is shown. Here, the so called sample is more properly described as a 'model' vehicle.

DAMAGES

**[23]** I do not find the claim for the additional damages proven, however.

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Once time has been set at large, this claim has to be particularised and properly proven as accruing from a breach of the contract. I agree with the defendants' contention that PW3's evidence (the supervisor) is unsatisfactory from the point of view of proof. This witness was not in a position to conclusively state what was the exact amount incurred. To this extent, the documents produced at trial as exhs P14–18 (pp 11–62 of bundle of documents C) do not establish the actual loss claimed.

**[24]** In any event, the hiring cost has to be set against the full amount which the plaintiff would have needed to pay for the tipper lorry had the contract for its sale been completely performed as per contract.

CONCLUSION

**[25]** Judgment to be entered and recorded for (a) a refund of the deposit and/or, part payment of RM24,160 paid by the plaintiff to the defendants; (c) repair costs of RM464; (d) interest at 8%pa on the sum awarded by this court, namely sums (a) and (b) from the date of filing of the action until date of full and final settlement. As for the counterclaim, it is accordingly dismissed. Costs to be taxed.

**[26]** Further order that the plaintiff take immediate steps to ensure that the JPJ registration card presently in the possession and custody of Orix Leasing be returned to the defendants.

*Plaintiff's claim allowed and defendants' counterclaim dismissed with costs to be taxed.*

Reported by Ashok Kumar